NO. 85-454

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SAUL MUNOZ SIBAJA and
RAFAELA ARRIETA PORRAS, ET AL
Petitioners,

VS.

DOW CHEMICAL COMPANY and
SHELL OIL COMPANY
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTION PRESENTED

Whether, under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), state or federal principles of *forum non conveniens* apply in federal diversity actions.

LIST OF INTERESTED PARTIES

SAUL MUNOZ SIBAJA and RAFAELA ARRIETA PORRAS, ROBERTO CERDA AGUILAR and SINAI TORRES ROSALES, VICENTE FLORES VALVERDE and MARIA MAYELA VEGA FIGUREROA, BOLIVAR ARIAS MORA, ALFONSO CAMPOS RODRIGUEZ and MARIA JIMENEZ BENAVIDES, JUAN BAUTISTA VASQUEZ and MARIA ISABEL CHAVARRIA SALAS, VICTOR SOLIS ROJAS and ROSA BADILLA PEREZ, MIGUEL CHAVARRIA ZUNIGA, JOAQUIN ZAMORA ARRIETA, TACITO CAMPOS GARCIA and YAMILETH NURIS VILLEGAS DIAS, SEGUNDA RODRIGUEZ RODRIGUEZ and MARY ELIZONDO UMANA, ELIECER ACOSTA MONTERO and EMMA JIMENEZ RAMIREZ, MANUEL CHAVES NUNEZ and MIREYA RODRIGUEZ RODRIGUEZ, CARLOS GARITA SANDI and MELITINA GONZALES, EDWIN GOMEZ CASTRILLO and ODILI TORRES ACUNA, MAGIN FERNANDEZ GARCIA and PAULA CORTEZ GOMEZ, MEFTALI ARAYA GARITA and LEDA ESPINOZA GAMBOA, MARGARITO ZUNIGA GUTIERREZ and ANAIS SANCHEZ ROJAS, DANIEL LORIA MORERA and PETRA BERTA NAVARRETE TORRES, MIGUEL ZUNIGA PENA and MARIA DE LA CRUZ GONZALES GONZALES, ISAIAS SANCHEZ RIVERA and FIDELIA ALVARADO SOLORZANO, AUGUSTO LEITON RODRIGUEZ and MERCEDES RODRIGUEZ ARRIETA, ANGEL LOBO ROJAS and MARGOT VARELA RAMIREZ, CASIMIRO LOPEZ SANDOVAL and ALEJANDRINA VEGA VILLALOBOS, JOSE SOSSA SOSSA and FLORY ALFARO JIMENEZ, ANTONIO GUTIERREZ ZUMBADO and MARIA DE LOS ANGELES, GERARDO PERAZA GARRO and NELLY UMANA ARIAS, ELIAS HERNANDEZ BADILLA, BENEDICTO CAMPOS CORRALES, MARIO SOLANO JIMENEZ, BOLIVAR ARIAS MORA,

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

SAUL MUNOZ SIBAJA and
RAFAELA ARRIETA PORRAS, ET AL
Petitioner,

vs.

DOW CHEMICAL COMPANY and
SHELL OIL COMPANY
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action on April 16, 1985, petition for rehearing thereof having been denied May 23, 1985.

OPINIONS BELOW

The opinion of the Eleventh Circuit in this case appears as *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir. 1985). (Appendix pp. 1-9). Rehearing of that opinion was denied, at 765 F.2d 154. (Appendix pp. 10-11).The unpublished order of the District Court for the Southern District

of Miami appear in the Appendix attached hereto. (Appendix pp. 12-18).

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Eleventh Circuit was entered on April 16, 1985. Rehearing was denied by that court on May 23, 1985. This Petition for Writ of Certiorari is hereby filed within 90 days of the denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

This case involves application of the Rules of Decision Act 28 U.S.C. § 1652 (1982), which provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as the rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

Petitioners are Costa Rican agricultural workers who claim to have been sterilized as a result of their exposure to pesticides manufactured by Dow Chemical Company and Shell Oil Company (hereinafter "Dow" and "Shell" respectively). These workers filed suit in Florida state court seeking recovery of damages under product liability theories of negligence, strict liability in tort and implied warranty.

Dow and Shell removed this action to federal court on

June 1, 1983. Following removal, each manufacturer filed a Motion to Dismiss or, in the Alternative, Motion to Transfer. These Motions to Dismiss were predicated upon the federal doctrine of *forum non conveniens* and, in the alternative, 28 U.S.C. §1404(a), the federal provision for transfer of venue.

Petitioners promptly filed a Motion for Extension of Time within which to respond to Defendants' Motions to Dismiss. Although not conceding that the federal doctrine of *forum non conveniens* was a proper focus, Petitioners requested that they be given the opportunity to receive Defendants' answers to all outstanding discovery requests and to utilize those answers in formulating responses to Defendants' Motions.

Petitioners filed Motions to Compel Discovery and a Response to Defendants' Motions to Dismiss within the period prescribed by the trial court. The Plaintiffs' Response to Defendants' Motions was twofold. First, Petitioners contended that under *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), state rather than federal principles of *forum non conveniens* applied and compelled a denial of Defendants' Motions. Secondly, Petitioners contended that, absent discovery on the factual issues raised by Dow and Shell, Petitioners were unable to respond to the manufacturers' arguments concerning the federal rule of *forum non conveniens*.

The Motions to Compel Discovery were never ruled upon by the trial court. However, on August 25, 1983, the trial court granted Defendants' Motions to Dismiss (Appendix pp. 12-18) holding that federal principles of *forum non conveniens* applied and that, under the facts adduced, those principles required dismissal. Petitioners perfected their appeal to the United States Court of Appeals for the Eleventh Circuit on September 21, 1983. Oral

argument was heard on August 3, 1984. On April 16, 1985 the Eleventh Circuit affirmed the trial court's judgment. *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir. 1985). (Appendix pp. 1-9). Rehearing was denied by the Eleventh Circuit on May 23, 1985. 765 F.2d 154. (Appendix pp. 10-11).

The facts in this case are not in dispute for purposes of this petition. The only issue to be determined is a legal one: Whether, under application of the *Erie* doctrine, this case should be tried on the merits under the dictates of the Florida law of *forum non conveniens*, or dismissed under the federal common law principle.

REASONS FOR GRANTING THE WRIT

A. THIS CASE REPRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS BEEN RECOGNIZED BUT NOT DECIDED BY THIS COURT.

Review of this case is urged to resolve a far-reaching legal question repeatedly recognized but not heretofore decided by this Court, *viz*., whether, under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) state or federal principles of *forum non conveniens* apply in diversity actions.

On four occasions this Court has endeavored to crystalize the doctrine of *forum non conveniens* as a matter of federal common law. *Piper Aircraft Co. v. Reyno* 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Koster v. Lumberman's Mutual Casualty Co.*, 330 U.S. 518 (1947); *Williams v. Greenbay and Western R. Co.*, 326 U.S. 549 (1946). At each turn, this Court has recognized that a significant *Erie* question is presented where state and federal rules of *forum non conveniens* diverge, but has refrained from resolving the issue:

> In previous *forum non conveniens* decisions, the Court has left unresolved the question whether under *Erie R. Co. v. Thompkins*, 304 U.S. 64 (1938), state or federal law of *forum non conveniens* applies in a diversity case. *Gilbert*, 330 U.S. at 509; *Koster*, 330 U.S. at 529; *Williams v. Greenbay & Western R. Co., supra*, at 551, 558-559. The Court did not decide this issue because the same result would have been reached in each case under federal or state law. The lower courts in these cases

> reached the same conclusion: Pennsylvania and California law on *forum non conveniens* dismissals are virtually identical to federal law. [Citation omitted] Thus, here also, we need not resolve the *Erie* question.

Piper Aircraft Co. v. Reyno, 454 U.S. at 248, n.13.

In contrast to the *forum non conveniens* cases previously decided by this Court, the instant case directly presents the *Erie* paradigm. The law of the State of Florida *precludes* a *forum non conveniens* dismissal of this action. For, the Supreme Court of Florida considers it a "fundamental interest" of the State to resolve controversies involving Florida citizens.

> If venue has been properly established because one of the parties is a resident of this state, then *the suit may not be dismissed because another state may be more appropriate.* We believe the certainty of resolution of the dispute outweighs the possible benefits achieved by dismissal in favor of a more convenient forum. *This state has a fundamental interest in resolving controversies involving its citizens.*

Houston v. Caldwell, 359 So.2d 858, 861 (Fla. 1978) (emphasis added). *See also, Seaboard Coastline R. v. Swain*, 362 So.2d 17, 18 (Fla. 1978); *Waite v. Summit Leasing & Capital International Corp.*, 441 So.2d 185, 186 (Fla.Dist. Ct.App. 1983).

The federal common law doctrine, on the other hand, authorizes discretionary dismissal upon balancing the rela-

tive convenience of the litigants and the forum. *E.g., Piper Aircraft Co. v. Reyno*, supra.

In upholding the application of federal rather than state principles of *forum non conveniens* in the case below, the Eleventh Circuit permitted the accident of diversity of citizenship to constitute the deciding factor in whether this case is dismissed or tried to verdict. Such a holding stands in defiance of *Erie* and its progeny. Had the Eleventh Circuit undertaken the *Erie* analysis prescribed by this Court, a different legal conclusion would necessarily have resulted.

In *Hanna v. Plumer*, 380 U.S. 460 (1965), this Court explicitly rejected a "litmus paper" approach to determining the substantive or procedural nature of a rule of law under *Erie*. What is "substantive" for *Erie* purposes can only be determined through application of the analysis set forth in *Hanna*:

> The line between "substantive" and "procedure" shifts as the legal context changes. "Each implies different variables depending upon the particular problem for which it is used." *Guaranty Trust Co. v. York* [326 U.S. 99 (1945)]; Cook, The Logical and Legal Basis of the Conflict of Laws, pp. 154-183 (1942). It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state "substantive" law and federal "procedural" law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions. When a situation is covered by one of the Federal Rules, the question fac-

> ing the Court is a far cry from the typical, relatively unguided *Erie* choice.

Hanna v. Plumer, 380 U.S. at 471.

Prior to *Hanna*, in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), this Court had devised an "outcome determinative" test in concluding that state statutes of limitation, although procedural in some contexts, are "substantive" for *Erie* purposes. "The nub of the policy that underlies *Erie Railroad Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of a state court a block away should not lead to a substantially different result." *York*, 326 U.S. at 109.

The test of *York* was then refined in *Hanna*. There it was determined that in the absence of a Federal Rule of Civil Procedure or Federal Statute directly on point, the state rule of law is to apply in federal diversity cases if its application: (1) is outcome determinative *and* (2) furthers the twin aims of the *Erie* Doctrine. "The 'outcome-determination' test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws." *Hanna*, 380 U.S. at 468.

The viability of the *Hanna* test was recently reiterated by this Court in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) where it was reasoned that state rules of service of summons could not be replaced by federal common law doctrine in the absence of a congressionally mandated federal rule.

> It is sufficient to note that although in this case failure to apply the state service law

> might not create any problem of forum shopping the result would be an "inequitable administration" of the law. *Hanna v. Plumer*, 380 U.S. 468. There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants. The policies underlying diversity jurisdiction do not support such a distinction between state and federal plaintiffs, and *Erie* and its progeny do not permit it.

Walker, 740 U.S. at 753.

In an attempt to escape the clear applicability of *Hanna*, the Eleventh Circuit below concluded, with no citation of authority,that although state law in this case "*may* qualify" as substantive law under *Hanna* , such is not the case "under the circumstances presented here." 757 F.2d at 1219. By so stating its result, the appellate court revealed its total failure to grasp the essential holding of the *Hanna* decision. Whether the Florida law of *forum non conveniens* law is "substantive" or "procedural" for *Erie* purposes is a conclusion that can be reached *only* after applying the analysis prescribed by this Court.

Without question, the application of the federal common law doctrine of *forum non conveniens* is outcome determinative in this case. This fact was recognized by the Eleventh Circuit below. *Sibaja*, 757 F.2d at 1219. More importantly, however, the imposition of the federal doctrine in light of the Florida Supreme Court's rule to the contrary, fosters

forum shopping and promotes inequitable administration of the laws. Yet this critical inquiry was overlooked by the Eleventh Circuit.

Forum shopping between state and federal court is certainly encouraged by application of the federal doctrine of *forum non conveniens* in this case. Obviously, the chasm existing between federal and Florida doctrine was a major consideration in the Defendants' decision to remove to federal court. This type of forum shopping can be prevented *only* through application of Florida principles of *forum non conveniens* in this diversity action.

The decision below also works to encourage an inequitable administration of the laws. As the Eleventh Circuit recognized, the accident of diversity constitutes *the* deciding factor in the whether this lawsuit is tried to verdict or dismissed. In effect, the appellate court has thus rewarded the Defendants for manipulating diversity jurisdiction to their advantage by virtue of the federal removal statute. Such a consequence is foreign to the concept of diversity jurisdiction as initially conceived, *see, e.g.*, The Federalist, No. 80 (Hamilton), and as interpreted by this Court in *Erie* and its progeny.

The Eleventh Circuit has simply not applied the *Erie* doctrine to this case. In so doing, it not only rendered a decision in defiance of this Court's prescribed analysis, but inexplicably usurped the power of the State of Florida to determine which of its residents can be brought to trial. The State of Florida's "fundamental interest in resolving controversies involving its citizens," *Houston v. Caldwell*, 359 So.2d at 861, was disregarded by the court below for the sake of federal administrative convenience in controlling its crowded docket. *Sibaja*, 757 F.2d at 1218. Such an

encroachment on the power of the State of Florida cannot be condoned within our federal system. *Erie* tolerates no such result. The *Erie* question left open by this Court on previous occasions, must be resolved within the context of this case.

B. THIS CASE PRESENTS A FUNDAMENTAL ERROR OF LAW OF EXCEPTIONAL IMPORTANCE REQUIRING THIS COURT'S POWER OF SUPERVISION BECAUSE THE ELEVENTH CIRCUIT AUTHORED AN UNPRECEDENTED *ERIE* RULE THAT CONFLICTS WITH PRIOR ANNUNCIATIONS OF THE DOCTRINE.

In lieu of analyzing the *Erie* question presented by this case in accordance with this Court's precedent, the Eleventh Circuit below set forth the following conclusions of law:

> [T]he trial court's decision, under the circumstances presented here, whether to exercise its jurisdiction and decide the case was not a decision going to the character and result of the controversy. Rather, it was a decision that occurred before, and completely apart from, any application of state substantive law. *A trial 'court only reaches the state rule of decision, relating to the character and result of the litigation, once it has decided to try the case and determine whether the plaintiff has a valid claim for relief.* We hold, accordingly, that the district court's application of the doctrine of *forum non conveniens* in this case did not operate as a state substantive rule of law and thus transgress *Erie's* constitutional prohibition.

Sibaja, 757 F.2d at 1219. (emphasis supplied, footnote omitted).

By so stating, the Eleventh Circuit has introduced a global *Erie* principle allowing federal courts to disregard the whole of state law until it is determined that the case will be tried on the merits. This sweeping pronouncement is bereft of any precedential support and conflicts with the prior pronouncement of this Court and the various circuits.

Indeed, under *Erie*, state law is routinely applied in federal court before any determination is made to hear a case on the merits. The application of state rules concerning personal jurisdiction under *Erie* provides a vivid example. While this Court has yet to rule on the issue, there is concurrence among the circuits that under *Erie*, "[a] federal district court sitting in diversity has personal jurisdiction over the defendant to the extent permitted by state law." *Rubaii v. Lakewood Pipe of Texas, Inc.*, 695 F.2d 541, 543 (11th Cir. 1983).[1] Yet, certainly, a trial court must reach the state rule of decision on jurisdiction before "it has decided

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1. For United States Court of Appeals opinions applying state jurisdictional law in federal diversity suits, *see, e.g., Wyatt v. Kaplan*, 686 F.2d 276, 285 (5th Cir. 1982); *Mountaire Feeds, Inc. v. Argo Impex, S.A.*, 677 F.2d 651, 653 (8th Cir. 1982); *Donahue v. Far Eastern Air Transport Corp.*, 652 F.2d 1032, 1036 (D.C. Cir. 1981); *Lakeside Bridge & Steel v. Mountain State Const. Co., Inc.*, 597 F.2d 596, 598 (7th Cir. 1979), *cert. denied*, 445 U.S. 907; *Intermeat, Inc. v. American Poultry, Inc.*, 575 F.2d 1017, 1020 (2nd Cir. 1978); *Amba Marketing Systems, Inc., v. Jobar Intern, Inc.*, 551 F.2d 784, 789 (9th Cir. 1977); *Davis H. Elliot Co., Inc. v. Caribbean Utilities Co., Ltd.*, 513 F.2d 1176, 1179 (6th Cir. 1975); *Quarles v. Fuqua Industries, Inc.*, 504 F.2d 1358, 1361 (10th Cir. 1974); *Pujol v. United States Life Ins. Co.*, 396 F.2d 430 (1st Cir. 1968)

to try the case and determine whether the Plaintiff has a valid claim for relief." *Sibaja*, 757 F.2d at 1219. Indeed, jurisdictional questions must arise, if at all, *before* any issue regarding *forum non conveniens*, since the doctrine of *forum non conveniens* assumes that jurisdiction and venue are properly established. *Piper Aircraft Co. v. Reyno*, supra. Thus, under the reasoning of *Sibaja*, the Eleventh Circuit would rewrite the law of the circuit courts and find personal jurisdiction a matter to be decided under *federal* rather than state principles in diversity cases: A concept that finds no support in federal law.

There can be no rational basis for treating so differently the concepts of jurisdiction and *forum non conveniens* under *Erie*. Indeed, the two concepts are inextricably related as each reflects a well-considered state policy regarding when a state will afford a forum for litigation which may not have maximum contact with the state. Moreover, although it is fully understood that Congress *could* promulgate a federal rule of personal long arm jurisdiction and dismissal for *forum non conveniens*, in each instance it has refrained from doing so. As Judge Friendly convincingly wrote for an en banc sitting of the Second Circuit in *Arrowsmith v. United Press International*, 320 F.2d 219, 226 (2nd Cir. 1963):

> Despite contrary intimations as to our position in the dissent, *we fully concede that the constitutional doctrine announced in Erie Railroad v. Tompkins* (citation omitted), *would not prevent Congress or its rule-making delegate from authorizing a district court to assume jurisdiction over a foreign corporation in an ordinary diversity case although the state court would not;*

* * *

> *But we do find no federal policy that should lead federal courts in diversity cases to override valid state laws as to the subjection of foreign corporations to suit, in the absence of direction by federal stature or rule.* State statutes determining what foreign corporation may be sued, for what, and by whom, are not mere whimsy; like most legislation they represent a balancing of various considerations - for example, affording a forum for wrongs connected with the state and conveniencing resident plaintiffs, while avoiding the discouragement of activity within the state by foreign corporations. *We see nothing in the concept of diversity jurisdiction that should lead us to read into the governing statutes a Congressional mandate, unexpressed by Congress itself to disregard the balance thus struck by the states.*

Arrowsmith at 226. (emphasis supplied).

Nowhere in the shadow of *Erie* is there any justification for the conclusion below that state law may be set aside in federal court prior to determining the validity of the plaintiff's clain for relief. This Court's recent holding in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) is but one example highlighting the misguided notion proffered by the Eleventh Circuit. In *Walker*, it was determined that state service of process rules - a far cry from the merits of the claim presented - were applicable in federal diversity actions. "The reasons for the application of such a state service requirement in a diversity action in the absence of a conflicting federal rule are well explained in *Erie* . . . and need

not be repeated here." *Id.* at 753.

State door-closing rules are frequently recognized in federal court as the basis for denying a federal forum even where the state rule has no bearing on whether the plaintiff has a valid substantive claim for relief. *See, e.g., Ragan v. Merchants Transfer of Warehouse Co.*, 337 U.S. 530 (1949) (state service of process law prohibits claim in federal court); *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949) (failure to qualify to do business under state law forecloses claim in federal court). In *Angel v. Bullington*, 330 U.S. 183 (1947), this Court announced that where the State of North Carolina would not maintain jurisdiction over a suit for deficiency judgment, neither should a federal court:

> If North Carolina has authoritatively announced that deficiency judgments cannot be served within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. North Carolina would hardly allow defeat of statewide policy through occasional suits in a federal court. *What is more important, diversity jurisdiction must follow state law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld.*

Angel, 330 U.S. at 191-92 (emphasis supplied).

By the same token, a federal court in Florida, sitting in diversity, cannot withhold those rights which Florida has *granted* without a clear mandate from Congress or the Constitution to do so. There can be no justification for

differentiating between state door-closing and door-opening policies in this regard.

The court below curtly concluded that Florida law of *forum non conveniens* need not be honored in a federal diversity case because application of the federal judge-made doctrine does not operate as "state substantive law." In so doing, it assumed that the state "rules of decision" to be followed in federal diversity actions are those rules of law concerning the validity of a plaintiffs cause of action. *Sibaja*, 757 F.2d at 1219. It thus equated the *merits* of the case with state *substantive* law citing *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945), for support. *York* says no such thing. In fact, *York* clearly rebukes such conclusory reasoning:

> *Erie Railroad Co. v. Tompkins*, has been applied with an eye alert to essentials in avoiding disregard of state law in diversity cases in federal courts. A policy so important to our federalism must be kept free from entanglement with analytical or terminological niceties.
>
> Plainly enough, a statute that would completely bar recovery in a suit if brought in a state court bears on a state-created right vitally and not merely formally or negligibly. *As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow state law.*

Id. at 110. (emphasis supplied).

By merging the concept of a "valid claim for relief" with "state substantive law" under *Erie*, the Eleventh Circuit carefully acted to avoid the clear direction of the Rules of Decision Act, 28 U.S.C. §1652 (1982). That statute provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as the rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. §1652 (1982).

Clearly, state "substantive law" to be applied under *Erie* does not refer only to state law defining a claim for relief. *E.G. Walker v. Armco Steel Corp.*, supra; *Hanna v. Plumer*, supra; *Angel v. Bullington*, supra; *Guaranty Trust v. York*, supra; *Rubaii v. Lakewood Pipe of Texas*, supra; *Arrowsmith v. United Press Int'l.*, supra. In a case such as this, where there is no Congressional or Constitutional mandate to apply the federal doctrine of *forum non conveniens*, and where the law of Florida, based on the state's fundamental interest in resolving controversies among its citizens, directly conflicts with the federal common law doctrine, *Erie* requires application of state law as the qualified rule of decision. This is so because substitution of the federal doctrine determines the outcome of this case and fosters forum shopping as well as the inequitable administration of the laws. *Hanna v. Plumer*, supra. (See discussion, Section A, above). This is further so, even though reference to the Florida rule of *forum non conveniens* - like that of personal jurisdiction - is made before any decision as to the validity of Plaintiffs' underlying claim for relief. *See Rubaii*, supra; *Arrowsmith*, supra. To hold otherwise undermines the

federalist principles protected by the *Erie* doctrine.

The opinion of the Eleventh Circuit below erroneously characterized the *Erie* doctrine by redefining its terms. Grant of certiorari is requested to correct this fundamental error of law.

CONCLUSION

For the reasons stated, Petitioner respectfully submits that the writ prayed for should issue.

Respectfully submitted,

BARON & BUDD
A PROFESSIONAL CORPORATION
8333 Douglas Avenue, 10th Floor
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214/369-3605

BY: /s/ Jane N. Saginaw
JANE N. SAGINAW

BY: /s/ Russell W. Budd
RUSSELL W. BUDD

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been forwarded to the following attorneys for Respondents, via regular mail on this the 14th day of August, 1985.

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APPENDIX A

Saul Munoz SIBAJA, Rafaela Arrieta Porra, et al.,
Plaintiffs-Appellants,

v.

DOW CHEMICAL COMPANY, et al.,
Defendants-Appellees.

No. 83-5655.

United States Court of Appeals,
Eleventh Circuit.

April 16, 1985.

Before TJOFLAT and VANCE, Circuit Judges, and ATKINS*, District Judge.

PER CURIAM:

The district court dismissed this diversity case under the doctrine of *forum non conveniens.* The plaintiffs appeal, claiming that the *Erie*[1] doctrine required the court to apply the state *forum non conveniens* rule which would have precluded the dismissal. We affirm.

I

The plaintiffs are fifty-eight Costa Rican agricultural workers. They claim to have been sterilized as a result of

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* Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

1. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

their exposure in Costa Rica to pesticides manufactured by either Dow Chemical Company or Shell Oil Company. In May 1983, they sued these companies in Florida state court, seeking damages under product liability theories of negligence, strict liability in tort and implied warranty. The Florida court had personal jurisdiction over the defendants because they were qualified to transact business in the State of Florida. Fla. Stat. § 48.091 (1983).[2]

The defendants removed the case to the U.S. District Court for the Southern District of Florida, pursuant to 28 U.S.C. § 1332(a)(2) (1982), and, thereafter, moved to dismiss the action on the ground of *forum non conveniens*. They argued that the plaintiffs should prosecute their claims in the courts of Costa Rica: the plaintiffs are Costa Rican citizens; they were injured in Costa Rica; and substantially all of the evidence and witnesses are in Costa Rica. Furthermore, Florida's choice of law rule would require the district court to apply the substantive law of Costa Rica.

The plaintiffs, in response, argued that the *Erie* doctrine requires a federal district court, sitting in a diversity case, to apply the state *forum non conveniens* rule rather than the federal rule. Florida precludes the dismissal of an action under the doctrine, where one of the parties is a resident, *Seaboard Coastline Railroad v. Swain*, 362 So.2d 17, 18 (Fla.1978); *Houston v. Caldwell*, 359 So.2d 858, 861 (Fla. 1978); *Waite v. Summit Leasing & Capital International*

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2. Dow Chemical Company and Shell Oil Company are major international corporations. They are subject to jurisdiction over their persons in the courts of every state and several foreign countries, including Costa Rica. The plaintiffs chose to sue them in Florida.

Corp., 441 So.2d 185, 185 (Fla. Dist. Ct. App.1983);[3] therefore, the plaintiffs continued, the district court transgressed the *Erie* rule in dismissing the action.

[1,2] The district court, after weighing the traditional *forum non conveniens* factors,[4] concluded that the convenience of the parties, the witnesses and the court, and

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3. The other states of the Union would, apparently, apply the doctrine and dismiss the case under the circumstances presented here. *See, e.g., Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147, 155 n. 10 (2d Cir.1980) ("[a]pparently the only state where the court of last resort has continued to reject the doctrine [of *forum non conveniens*] as a matter of law is Florida").

4. The district court applied the federal *forum non conveniens* doctrine as set forth in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 893, 91 L.Ed. 1055 (1947), and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). In *Gulf Oil Corp. v. Gilbert*, the Supreme Court provided a list of "private interest factors," affecting the convenience of the litigants, and a list of "public interest factors, " affecting the convenience of the forum, to guide the trial court's application of the doctrine. The private interest factors include the "relative ease of access to sources of proof availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." 330 U.S. at 508, 67 S.Ct. at 843. The public interest factors include the admininstrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.*, at 509, 67 S.Ct. at 843. *See also, Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 67 S.Ct. 828, 91 L.Ed. 1067 (1947).

the interests of justice, dictated that the case be dismissed, and it granted the defendants' motion.[5] in appealing, the

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5. The district court explained how the factors established by the Supreme Court to guide its *forum non conveniens* inquiry warranted dismissal of the action as follows:

> Applying these considerations to the case at bar, the Court finds that the considerations overwhelming weigh in favor of dismissal. The private interests are hampered in that the alleged injuries occurred in Costa Rica. All the plaintiffs are Costa Rican. Most of the evidence and witnesses are in Costa Rica and none are in Florida and compulsory process would not be available to compel production of this evidence or the attendance of these witnesses. The cost of obtaining the evidence from Costa Rica would be substantial, if possible. The defendants would not be able to implead potential third party defendants located in Costa Rica in this action in Florida. And, as was the case in *Piper Aircraft*, the Plaintiffs have not offered any specific reason showing the convenience of their choice.
>
> As to the public interest factors, this case is essentially fifty eight different law suits with different elements of damages, negligence, contributor negligence etc. It could not help but congest this Court's docket more than it would that of a Court at the situs of the injury simply because of the logistics of dealing with fifty eight different Plaintiffs at this distance. It would force the Court to conduct a complex exercise in comparative law and consider a foreign law with which the Court is not familiar and which is in a foreign language. The avoidance of such comparisons is one of the objectives of the doctrine of *forum non conveniens*. It would require local jurors to hear and decide a dispute that has no connection with this community. And, finally, the the Defendants have asserted that Costa Rica offers the Plaintiffs an alternative forum with an adequate remedy, an assertion that has not been rebutted by the Plaintiffs.

(Citations omitted.)

plaintiffs do not dispute the district court's interpretation of the doctrine, as it has been applied in the federal courts. and they do not dispute the court's weighing of the relevant factors. They also do not dispute that this case presents a paradigm for the invocation of the doctrine. Their argument is, purely, that *Erie* requires the application of the state rule because this is a diversity case.

II

[3] The doctrine of *forum non conveniens* authorizes a trial court to decline to exercise its jurisdiction, even though the court has venue, where it appears that the convenience of the parties and the court, and the interests of justice indicate that the action should be tried in another forum. The doctrine derives from the court's inherent power, under article III of the Constitution, to control the administration of the litigation before it and to prevent its process from becoming an instrument of abuse, injustice and oppression. As the Supreme Court observed nearly 100 years ago, "the equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustice, are inherent and equally extensive and efficient." *Gumbel v. Pitkin*, 124 U.S. 131, 144, 8 S.Ct. 379, 383,31 L.Ed. 374 (1888). *See also Pueblo De Taos v. Archuleta*, 64 F.2d 807, 813 (10th Cir.1933); I. J. Moore, J. Lucas, H. Fink, D. Weckstein, & J. Wicker, Moore's Federal Practice ¶ 0.60[6] (2d ed. 1984). *Cf. Ownbey v. Morgan*, 256 U.S. 94, 110, 41 S.Ct. 433, 438, 65 L.Ed. 837 (1921) (inherent power of state court).

[4,5] The doctrine of *forum non conveniens* is but one manifestation of that inherent power. The doctrine addresses "whether the actions brought are vexatious or oppressive or whether the interests of justice require that the trial be had in a more appropriate forum." *Koster v. Lumbermens*

Mutual Casualty Co., 330 U.S. 518, 530, 67 S.Ct. 828, 834-35, 91 L.Ed. 1067 (1947); *see Williams v. Green Bay & W.R. Ca.*, 326 U.S. 549, 555-56, 66 S.Ct. 284, 287, 90 L.Ed. 311 (1946). Under the federal standard, "dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249, 102 S.Ct. 252, 262, 70 L.Ed.2d 419 (1981).

The court's inherent power to protect the integrity of its process through *forum non conveniens* is similar to the court's inherent power to punish contempt. Of the latter, the Supreme Court has written:

> It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior federal courts are concerned, however, it is not beyond the authority of Congress; but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. That it may be regulated within limits not precisely defined may not be doubted.

Michaelson v. United States, 266 U.S. 42, 65-66, 45 S.Ct. 18, 20, 69 L.Ed. 162 (1924). We think this statement applies with equal force to the authority of a federal district court to dismiss an action for want of an appropriate forum.

The Court's interest in controlling its crowded docket also provides a basis for the Court's inherent power to dismiss

on grounds of *forum non conveniens*: "the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems.'" *Piper Aircraft Co. v. Reyno*, 454 U.S. at 241, 102 S.Ct. at 258 (quoting *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. at 524, 67 S.Ct. at 831-32). "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947). The *forum non conveniens* doctrine is "designed in part to help courts avoid conducting complex exercises in comparative law," *Piper Aircraft Co.*, 454 U.S. at 251, 102 S.Ct. at 263, an exercise the court below would have to undertake if it litigated this case on the merits.

The plaintiffs acknowledge, as they must, the court's inherent power to dismiss a case for the purposes expressed in the doctrine. They insist, however, that *Erie* precludes a court from invoking this power if its invocation would control the "outcome" of the parties' controversy.

The *Erie* rule holds that neither Congress nor the courts have the constitutional authority to promulgate the substantive rule of law that controls the controversy in a diversity case:

> There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Erie Railroad v. Tompkins, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed; 1188 (1938). See also *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198, 202, 76 S.Ct. 273, 275, 100 L.Ed. 199 (1956). It is obvious that the district court here, in deciding the merits of the defendants' motions to dismiss, did not explicitly promulgate a state common law rule. The question thus becomes whether the court did so by implication. We think not.

We recognize that the application of the federal, rather than the state, *forum non conveniens* rule alters the outcome of this case. Under Florida law, the plaintiffs would litigate their claims to a conclusion on the merits; under federal law, they are precluded from reaching the merits. They are, in effect, consigned to the Costa Rican courts for trial. This does not mean, however, that, in dismissing their case, the federal court fashioned a state substantive rule in violation of *Erie*.

[6,7] The *forum non conveniens* doctrine is a rule of venue, not a rule of decision. The doctrine provides "simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of [the law]." *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 507, 67 S.Ct. at 842. In contrast, "rules of decision" are the "substantive" law of the state, the "legal rules [which] determine the outcome of a litigation." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109, 65 S.Ct. 1464, 1470, 89 L.Ed. 2079 (1945). It is true that a judge-made rule *may* qualify as a rule of decision if it substantially affects the "character or result of a litigation." *Hanna v. Plumer*, 380 U.S. 460, 467, 85 S.Ct. 1136, 1141, 14 L.Ed.2d 8 (1965). But the trial court's decision, under the circumstances presented here, whether to exercise its jurisdiction and decide the case was not a decision going to the character and result of the controversy. Rather, it was a decision that occurred before, and

completely apart from, any application of state substantive law. A trial court only reaches the state rule of decision, relating to the character and result of the litigation, once it has decided to try the case and determine whether the plaintiff has a valid claim for relief. We hold, accordingly, that the district court's application of the doctrine of *forum non conveniens* in this case did not operate as a state substantive rule of law and thus transgress *Erie's* constitutional prohibition.[6] The judgement of the district court is therefore

AFFIRMED.

WEST KEY NUMBER SYSTEM

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6. The plaintiffs claim that the district court's action violated the Rules of Decision Act, 28 U.S.C. § 1652 (1982), is plainly foreclosed by the foregoing analysis. That act provides:

> The laws of the several states, except where the Constition or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

APPENDIX B

UNITED STATES COURT OF APPEALS

Eleventh Circuit

DENIALS OF REHEARING EN BANC

(Rule 35 Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26)

Group 1 – Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Group 2 – Denials after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Group 3 – Denials on the Court's own motion after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Title	Docket Number	Date of Denial	Citation of Panel Decision
GROUP 1			
Bud Antle, Inc. v. Eastern Foods, Inc.	84-8106	6/5/85	S.D.Ga., 758 F.2d 1451
E.E.O.C. v. Atlanta Gas Light Co	84-8051	6/3/85	N.D.Ga., 751 F.2d 1188
E. Remy Martin & Co., S.A. v. Shaw-Ross Intern. Imports, Inc.	84-5212	6/6/85	S.D.Fla., 756 F.2d 1525
Francois v. Wainright	83-5775 85-5430	5/28/85	S.D.Fla., 763 F.2d 1187
Goldstein v. Manhattan Industries, Inc.	84-7233	5/30/85	N.D.Ala., 758 F.2d 1435
Sibaja v. Dow Chemical Co	83-5655	5/23/85	S.D.Fla., 757 F.2d 1215
Tyler v. Kemp	84-8213	6/4/85	N.D.Ga., 755 F.2d 741
U.S. v. Willis	83-7651	6/4/85	M.D.Ala., 759 F.2d 1486
Young v. Kemp	84-8408	6/7/85	M.D.Ga., 760 F.2d 1097
GROUP 3			
Ford v. Wainwright	84-5372	6/3/85	S.D.Fla., 752 F.2d 526

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-1347-CIV-JLK

SAUL MUNOZ SIBAJA and
RAFAELA ARRIETA PORRAS, et. al.,
Plaintiffs,

vs.

DOW CHEMICAL COMPANY and
SHELL OIL COMPANY

ORDER DISMISSING CAUSE

THIS CAUSE comes before the Court upon the Defendants' Motions to Dismiss.

In support of their motions to dismiss the Defendants have argued that this cause should be dismissed on the ground of forum non-conveniens. In support of that argument, they have asserted:

> 1. that each individual plaintiff was allegedly exposed to the product in question in Costa Rica;
> 2. that the evidence and witnesses, including all of the 58 Plaintiffs, are primarily located in Costa Rica;
> 3. that most of this evidence and these witnesses would not be subject to the compul-

sory process of this Court;
4. that even if such evidence and witnesses were made available voluntarily, the cost involved would be substantial;
5. that the witnesses and evidence within the United States are in places other than the Southern District of Florida and so would be just as obtainable in Costa Rica as in Florida;
6. that the Florida law of conflicts would apply the Costa Rican substantive law, which is in a foreign language unfamiliar to this Court;
7. that this cause of action has no contact with the Southern District of Florida and that the Public interest in providing a forum in Florida is out weighed by the costs of court congestion and jury duty;
8. that the judicial system of Costa Rica does provide a forum and a remedy for the Plaintiffs and both Defendants are subject to the jurisdiction of the Costa Rican judicial system or will submit to that jurisdiction;
9. and, that the application of the doctrine of forum non conveniens is within the sound discretion of the Court.

For support of their argument, the Defendants rely on *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), and *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

In their response to the motion to dismiss the Plaintiffs' argue that a major objective of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), was to avoid the unequal administration of the laws and the forum shopping that had previ-

ously been caused by the diversity jurisdiction of the Federal Courts. The Plaintiffs argue that to facilitate this objective the *Erie* Court attempted to minimize the variations between state and federal law as it would be applied in diversity cases. The argument then asserts that under Florida law this action could not be dismissed on the ground of forum non-conveniens because the Defendants are residents of Florida.

Because the doctrine of forum non-conveniens would not be available in this case if it were in State Court the Plaintiffs' would have this Court distinguish this case from *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), relied on by the Defendants, and then apply the Florida Law of forum non-conveniens. The distinction that the Plaintiffs would have this Court make is that in *Piper* the state law of forum non-conveniens was the same as the federal law of non-conveniens while that is not the situation here.

The Court, having considered the arguments of the parties and being fully advised, finds that the law as stated in *Piper Aircraft*, 454 U.S. 235, and *Gilbert*, 330 U.S. 501, governs this case. The Court finds further that application of the factors listed in *Piper Aircraft* and *Gilbert* to the case at bar requires that the motions to dismiss be granted.

The doctrine of *forum non-conveniens* is simply a tool that a court may use to resist imposition upon its jurisdiction is authorized by the letter of the law. General venue statutes are generally drawn to allow a plaintiff a choice of forums and Plaintiffs may be tempted to abuse their right to choose. *Gilbert*, 330 U.S. at 507. While the Plaintiffs choice of forums is usually assumed to be a convenient forum, that assumption is less reasonable and entitled to less weight when the Plaintiff is foreign. *Piper Aircraft*, 102 S. Ct. at 266. The determination of the *forum non-conveniens* question is within the sound discretion of the

trial court and when it is based on a reasonable consideration of the *Gilbert* factors, it will not be disturbed. *Piper Aircraft*, 102 S. Ct. at 266.

The pertinent factors for consideration, as detailed in *Gilbert*, are:

1. the private interests of the litigants:
   a. the relative ease of access to sources of proof;
   b. availability of compulsory process for attendance of unwilling witnesses;
   c. the cost of obtaining the attendance of witnesses;
   d. the possibility of viewing the premises concerned;
   e. and, all other practical problems that make trial of a case easy, expeditious and inexpensive;
2. the public interest:
   a. congestion of the court docket;
   b. the burden of jury duty for a case that has little or no relation to the community;
   c. the application of the law by a forum that is familiar with the law which governs the case.

Gilbert, 330 U.S. at 508.

In addition, the Court in *Piper Aircraft* considered the availability of an alternative forum that could exercise jurisdiction and offer the Plaintiffs a remedy; the inability to implead potential third party defendants in one jurisdiction; and, the added burden imposed on the Defendant as compared to the added convenience to be

realized by the Plaintiffs. 102 S. Ct. 252.

Applying these considerations to the case at bar, the Court finds that the considerations overwhelming weigh in favor of dismissal. The private interests are hampered in that the alleged injuries occured in Costa Rica. All the Plaintiffs are Costa Rican. Most of the evidence and witnesses are in Costa Rica and none are in Florida and compulsory process would not be available to compell production of this evidence or the attendance of these witnesses. The cost of obtaining the evidence from Costa Rica would be substantial, if possible. The Defendants would not be able to implead potential third party defendants located in Costa Rica in this action in Florida. And, as was the case in *Piper Aircraft*, the Plaintiffs have not offered any specific reason showing the convenience of their choice.

As to the public interest factors, this case is essentially fifty eight different law suits with different elements of damages, negligence, contributory negligence etc. It could not help but congest this Court's docket more than it would that of a Court at the situs of the injury simply because of the logistics of dealing with fifty eight different Plaintiffs at this distance. It would force the Court to conduct a complex exercise in comparative law and consider a foreign law with which the Court is not familiar and which is in a foreign language. The avoidance of such comparisons is one of the objectives of the doctrine of *forum non conveniens*. *Piper Aircraft*, 102 S.Ct. at 263. It would require local jurors to hear and decide a dispute that has no connection with this community. And, finally, the Defendants have asserted that Costa Rica offers the Plaintiffs an alternative forum with an adequate remedy, an assertion that has not been rebutted by the Plaintiffs.

The Plaintiffs contend that this Court must allow further discovery before it decides the issue of *forum non conveniens*. But the Court in *Piper Aircraft* found that a detailed inquiry into the facts was not necessary and, in fact would defeat the purpose of the doctrine. 102 S. Ct. at R7. As in *Piper Aircraft*, the Defendants here have moved for dismissal precisely because many crucial witnesses are located beyond the reach of the compulsory process of this Court and are thus difficult to identify or interview. The record contains the unrebutted allegations of the Defendants as to the difficulties caused by this choice of forum as well as affidavits substantiating such difficulties, this information is sufficient for the Court to adequately consider the *Gilbert* and *Piper Aircraft* factors.

As to the Plaintiffs' contention that state law should apply, the Court agrees with the statement of the United States District Court for the Southern District of Ohio in *in re Richardson-Merrell, Inc.*, 545 F.Supp. 1130 (S.D. Ohio 1982):

> [G]iven the discretionary nature of the *forum non conveniens* inquiry and the factors established by the Supreme Court to guide such a determination, it would appear anomalous for the Court to apply anything but federal principles.

545 F.Supp. at 1132.

> And:
>
> Most of the 'public interest factors' affecting the convenience of the forum relate peculiarly to the *court* in which the case is pending, rather than to the state in which the federal

court is located.

id. at n.3.

Accordingly, the Court does:

ORDER and ADJUDGE that the Defendants' Motions be, and they are, GRANTED. This cause is DISMISSED.

DONE and ORDERED in chambers at the United States Courthouse Miami, Dade County, Florida this 25th Day of August, 1983.

JUDGE JAMES LAWRENCE KING
JAMES LAWRENCE KING
U.S. DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-454

in the Supreme Court of the United States

OCTOBER TERM, 1985

SOL MUNOZ SIBAJA, et al.,
Petitioners,

vs.

THE DOW CHEMICAL COMPANY and
SHELL OIL COMPANY,
Respondents.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Eleventh Circuit

THE DOW CHEMICAL COMPANY'S BRIEF IN OPPOSITION

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26 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the court below was correct in affirming the dismissal of this action on the grounds of *forum non conveniens* with respect to the specific and unique facts presented here.

LIST OF INTERESTED PARTIES

SAUL MUNOZ SIBAJA and RAFAELA ARRIETA PORRAS, ROBERTO CERDA AGUILAR and SINAI TORRES ROSALES, VICENTE FLORES VALVERDE and MARIA MAYELA VEGA FIGUREROA, BOLIVAR ARIAS MORA, ALFONSO CAMPOS RODRIGUEZ and MARIA JIMENEZ BENAVIDES, JUAN BAUTISTA VASQUEZ and MARIA ISABEL CHAVARRIA SALAS, VICTOR SOLIS ROJAS and ROSA BADILLA PEREZ, MIGUEL CHAVARRIA ZUNIGA, JOAQUIN ZAMORA ARRIETA, TACITO CAMPOS GARCIA and YAMILETH NURIS VILLEGAS DIAS, SEGUNDA RODRIGUEZ RODRIGUEZ and MARY ELIZONDO UMANA, ELIECER ACOSTA MONTERO and EMMA JIMENEZ RAMIREZ, MANUEL CHAVES NUNEZ and MIREYA RODRIGUEZ RODRIGUEZ, CARLOS GARITA SANDI and MELITINA GONZALEZ, EDWIN GOMEZ CASTRILLO and ODILI TORRES ACUNA, MAGIN FERNANDEZ GARCIA and PAULA CORTEZ GOMEZ, MEFTALI ARAYA GARITA and LEDA ESPINOZA GAMBOA, MARGARITO ZUNIGA GUTIERREZ and ANAIS SANCHEZ ROJAS, DANIEL LORIA MORERA and PETRA BERTA NAVARRETE TORRES, MIGUEL ZUNIGA PENA and MARIA DE LA CRUZ GONZALEZ GONZALES, ISAIAS SANCHEZ RIVERA and FIDELIA ALVARADO SOLORZANO, AUGUSTO LEITON RODRIGUEZ and MERCEDES RODRIGUEZ ARRIETA, ANGEL LOBO ROJAS and MARGOT VARELA RAMIREZ, CASIMIRO LOPEZ SANDOVAL and ALEJANDRINA VEGA VILLALOBOS, JOSE SOSSA SOSSA and FLORY ALFARO JIMENEZ, ANTONIO GUTIERREZ ZUMBADO and MARIA DE LOS ANGELES, GERARDO PERAZA GARRO and NELLY UMANA

ARIAS, ELIAS HERNANDEZ BADILLA, BENEDICTO CAMPOS CORRALES, MARIO SOLANO JIMENEZ, BOLIVAR ARIAS MORA, PEDRO JIMENEZ MURILLO, JOSE GAMBOA RODRIGUEZ, RODRIGO GARITA SANDI,

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*A list of DOW'S subsidiaries and affiliates as of September, 1985 is set out in the appendix.

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in the

Supreme Court

of the

United States

OCTOBER TERM, 1985

SOL MUNOZ SIBAJA, et al.,
Petitioners,

vs.

THE DOW CHEMICAL COMPANY and
SHELL OIL COMPANY,
Respondents.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION

The Respondent, The Dow Chemical Company, prays that the Petition for Certiorari be denied.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is published at 757 F.2d 1215 (11th Cir. 1985). It is

accurately reproduced in the Petitioners' appendix. Rehearing was denied by the Eleventh Circuit at 765 F.2d 154 (11th Cir. 1985). The opinion of Judge King in the Southern District of Florida is not published. It is, however, accurately reproduced in the Petitioners' appendix.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

While the Rules of Decision Act, 28 U.S.C. §1652 (1982), as set forth in the Petition, is implicated in this case, it was not specifically argued below. Further, it was not specifically construed by the lower courts.

COUNTERSTATEMENT OF THE CASE

Appellants are fifty-eight (58) Costa Rican citizens. During the course of their employment in Costa Rica they claim injury when exposed to certain pesticides manufactured by The Dow Chemical Company (hereinafter Dow) and/or the Shell Oil Company (hereinafter Shell). Plaintiffs brought suit in the Eleventh Judicial Circuit Court in Dade County, Florida—a forum that has no connection with this litigation. Along with the complaint, Petitioners served in-depth interrogatories and requests for production pertaining to the merits of this case.

Respondents removed this case to the Southern District of Florida and moved to dismiss on the grounds of *forum non conveniens*. In support of these motions

Respondents served detailed affidavits containing facts pertinent to the "public and private interest factors" which are to be considered under the doctrine of *forum non conveniens. See Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), *rev'g* 153 F.2d 883. 170 A.L.R. 319 (2d Cir. 1946). Petitioners responded to these motions to dismiss. The Southern District of Florida granted these motions and dismissed the case based upon the federal jurisprudence pertaining to the doctrine of *forum non conveniens.* The dismissal was affirmed by the Eleventh Circuit and a request for rehearing was denied.

Petitioners, in their "Statement of the Case" say that the "only issue" is whether this case should be tried on its merits under the Florida rules of *forum non conveniens* or dismissed by application of the federal doctrine of *forum non conveniens.* The Respondents vigorously deny that this case would be tried on its merits by the Florida state courts. Respondents also vigorously dispute that the Florida doctrine of *forum non conveniens* would be applied to this case by a Florida court. This argument is set forth in more detail, *infra.*

ARGUMENT — REASONS FOR DENYING THE WRIT

I.

THERE IS NO IMPORTANT FEDERAL QUESTION OF LAW PRESENT

The issue in this case is narrow and unique to its facts. No amount of rhetoric can convert it to warranting review on certiorari. There is no important question of federal law present. The Petitioners' argument to the contrary is based upon an erroneous premise.

Petitioners assert that an important federal question is present because the Supreme Court has previously recognized a significant *Erie* question when federal and state rules of *forum non conveniens* diverge. Petitioners cite a footnote from *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 n. 13 (1981) for this proposition. Petitioners then argue here, under *Houston v. Caldwell*, 359 So.2d 858 (Fla. 1978) the Florida rules of *forum non conveniens* would preclude dismissal of this case. Thus, Petitioners contend that there is a significant *Erie* question involving constitutional notions of federalism because, they assert, the "accident of diversity" determines the outcome of this case.[1] Thus, Petitioners argue that there is a significant *Erie* — therefore federal — question presented here.

---

[1]It is true, apparently, the only state where the doctrine of *forum non conveniens* arguably might differ from the federal jurisprudence pertaining to that doctrine is the State of Florida. *See, e.g., Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147, 155 n. 10 (2d Cir. 1980).

Petitioners' argument contains a crucial and fatal flaw. Its primary premise is incorrect. The Florida rules of *forum non conveniens*, which Petitioners claim would preclude dismissal, would not even apply in this case even if it were tried in the Florida state courts. If the District Court were to apply Florida law in this case—which it certainly must do with respect to substantive law—it would be bound to apply the entirety of Florida's law. This would necessarily include the application of Florida's rules pertaining to conflicts, or choice of substantive law. *See Klaxton v. Stentor Electric Co., Inc.*, 313 U.S. 487 (1941); *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975). *See also* the many cases cited at Wright, Miller & Cooper, 19 *Federal Practice & Procedure*, §4506 at 73 n. 37 (1981). Thus, the Federal District Court in the Southern District of Florida applying Florida's substantive law would be bound to apply the Florida rules pertaining to choice of substantive law. Contrary to the implication in the Petition, Florida courts would choose to apply the substantive law of the jurisdiction with the most significant contacts, which would be Costa Rica. *See Bishop v. Florida Specialty Paint Co.*, 389 So.2d 999 (Fla. 1980); *Restatement of Conflict of Laws* (2d) §§ 145-146 (1971).[2]

It is quite clear that Florida law would require application of the substantive law of Costa Rica. The only way a Florida court would apply its own rules pertaining to *forum non conveniens*, on the present

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[2]*Restatement of Conflict of Laws* (2d) §146 (1971) provides that, "[i]n an action for personal injury the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship. . . ." *Id.*

facts, would be if *forum non conveniens* were a procedural concept. Here, Petitioners are vigorously disputing that *forum non conveniens* is procedural. It is Petitioners who assert that *forum non conveniens* is a substantive concept. Thus, it is clear that the Florida courts would never apply the Florida law of *forum non conveniens* to this case. Accordingly, the very heart of Petitioners' argument—that Florida rules of *forum non conveniens* would apply to this case and would preclude dismissal—is destroyed. It is, thus, evident that the Petition lacks merit and should be denied.[3]

Further, Petitioners again assert, that the "accident of diversity" interferes with what they call the opportunity of the Florida courts to resolve this matter which the Petitioners amazingly call a matter with which Florida has a fundamental interest. In fact, nothing can be more incorrect. Florida has absolutely no contact with, nor interest in, this lawsuit. This was correctly observed by both the District Court and the Eleventh Circuit. This entire litigation has nothing to do with the State of Florida and it is quite unfair to burden the courts and the citizens of this state with this litigation. Neither Shell nor Dow are Florida corporations and neither Shell nor Dow have their principal place of business in Florida. Moreover, the Petitioners themselves are foreign citizens and they have no true interest in litigating in

[3]A Florida court applying Costa Rican rules pertaining to *forum non conveniens* would dismiss this case. Jurisdiction of Costa Rican courts is strictly territorial. *See Civil Code of Costa Rica*, Articles 6 and 1045-1048; *Labor Code of Costa Rica*, Articles 210-212; *Code of Civil Procedure of Costa Rica*, Articles 1-7. Thus, if the tort took place elsewhere, jurisdiction would not be entertained. It is, therefore, clear that such a hypothetical Florida court applying Costa Rican law would similarly dismiss this case.

the State of Florida other than, perhaps, the fact that Dade County, Florida is traditionally recognized as a high verdict area. It has consistently been held that a plaintiff's choice of forum is not entitled to much deference when the plaintiffs are from a foreign country. *Reyno, supra*, 454 U.S. at 255.

Moreover, giving the Petitioners the benefit of doubt, and assuming, *arguendo*, that the Florida law of *forum non conveniens* would apply to the case if tried in the Florida state courts, the result would not be any different. That is, *Houston v. Caldwell, supra*, would not preclude dismissal here. *Houston v. Caldwell* involved a plaintiff who was resident of West Palm Beach, Florida. With respect to such a suit by a Florida citizen, the court observed that, naturally, there was a "fundamental interest in resolving controversies involving [Florida] citizens." 359 So.2d at 861. Such a "plaintiff's choice of venue is usually favored if the election is one which has been properly exercised under the applicable [venue] statutes." *Id.* at 860.

Additionally, the decision in *Southern Railway Co. v. McCubbins*, 196 So.2d 512 (Fla. 3d DCA 1967) is directly on point and mandates dismissal, under the Florida doctrine of *forum non conveniens*, where the plaintiff was not a Florida resident; the tort occurred outside Florida; and the defendant was not incorporated in Florida and did not have its principal place of business in Florida, but the defendant *did* have an office and agent in Dade County, Florida *and* it conducted business in the State of Florida. In *McCubbins* the Florida doctrine of *forum non conveniens* mandated dismissal. It can readily be seen that *McCubbins* is much more closely on point than *Houston v. Caldwell*. Therefore, even

assuming, *arguendo*, that the Florida doctrine would apply, it would require dismissal. Accordingly, the result would be the same as under the federal doctrine.

For the above reasons it is apparent that the Petitioners' argument is defective. That argument is premised upon the assumption that under Florida rules of *forum non conveniens* the Petitioners would proceed to judgment. However, as indicated above, this premise is incorrect because (a) Florida law of *forum non conveniens* would not even apply; and (b) assuming, *arguendo*, that it did, the Florida law of *forum non conveniens* would mandate dismissal just as is the case under the federal doctrine. Thus, there is no significant *Erie* question present. Accordingly, there is no significant federal question present here.

II.

THIS CASE DOES NOT INVOLVE A FUNDAMENTAL ERROR OF LAW OF EXCEPTIONAL IMPORTANCE.

The Eleventh Circuit was correct in its conclusion and in its analysis. The Eleventh Circuit was following the more substantial weight of authority in finding that the federal rules of *forum non conveniens* apply in this case. There can be no doubt that *forum non conveniens* is a procedural concept for *Erie* purposes. It is a "housekeeping rule" of the federal district courts. In large part the doctrine focuses upon the convenience and the docket *of the court* applying the doctrine. Clearly the concerns addressed by the doctrine would make it "anomalous for [a federal] court to apply anything

but federal principles [of *forum non conveniens*]." *Alexander v. Richardson Merrill, Inc.*, 542 F.Supp. 93, 98 (S.D. N.Y. 1982). Some federal courts have squarely and succinctly held that, for purposes of *Erie*, *forum non conveniens* is a procedural concept. "*Forum non conveniens* is a procedural doctrine that is governed by federal rather than state law even in cases where jurisdiction is granted on diversity of citizenship." *Ciprari v. Cruzerio*, 232 F.Supp. 433, 442 (S.D. N.Y. 1964). *Accord*, *Hodson v. A. H. Robbins Co.*, 528 F.Supp. 809 (E.D. Va. 1981); *Poe v. Marquette Cement Mfg. Co.*, 376 F.Supp. 1054, 1060 (D. Md. 1974); *Alexander v. Richardson Merrill, Inc.*, *supra*.

Forum non conveniens, as recognized by the Petitioners, is an incidence of venue. "Venue is an incidence of procedure." *Hadlich v. American Mail Line*, 82 F.Supp. 562, 563 (N.D. Cal. 1949). The doctrine pertains to the "public interest factors" associated with the federal courts themselves. It has nothing to do with private rights created by state substantive bodies of law. Professor Moore also recognized that *forum non conveniens* is procedural in the *Erie* context. Moore states that,

> this doctrine is but a facet of venue. Because of that, because the doctrine affects the trial convenience of the federal court and their dockets and because of the mobility of the federal judiciary on a national scale, *they should be independent of state doctrines of forum non conveniens*, fashioned for courts operating on a state scale. *Forum non conveniens* is procedural and the new code so treats it. *Erie R. Co. v. Tompkins* does *not* require conformity

> by the federal courts to the practice of the states in this matter.

Moore, 1A *Fed. Prac. and Pro.* §0.317(2) at 3232-33 (1981) (emphasis added).

Petitioners' argument is based upon what they perceive to be an inadequate *Hanna v. Plumer* "outcome-determinative" analysis by the Eleventh Circuit. However, this court recognized in *Hanna* itself that the " 'outcome-determination' analysis was never intended to serve as a talisman." *Hanna v. Plumer*, 380 U.S. 460, 466-67 (1965). More importantly, *Hanna* only controls where a *federal rule* directly conflicts with state law. This was recognized in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). *Walker* dealt with Federal Rule 3 which pertains to when an action is "commenced." The court found that Rule 3 did not conflict with state law on the subject. Thus, the court held "[s]ince there is no direct conflict between the federal rule and the state law, the *Hanna* analysis does not apply." *Id.* at 752. Instead, the case was controlled by *Erie* and *Ragan v. Merchants Transfer and Warehouse Co.*, 337 U.S. 530 (1949).

Accordingly, the Petitioners' argument that the Eleventh Circuit committed a fundamental error of law is incorrect. First, the Eleventh Circuit was quite correct in holding that *forum non conveniens* is not a substantive concept for purposes of *Erie*. Thus, the Eleventh Circuit was correct in applying the federal rules pertaining to that doctrine. Secondly, the Petitioners' argument in this respect is premised upon what they perceive was an inadequate "outcome-determinative" analysis which, Petitioners claim, was mandated by *Hanna v. Plumer*. However, *Hanna* only controls when

a case presents a direct conflict between a federal rule of civil procedure and a state law on the same topic. Such is not the case here.

Indeed, it is anomalous for a federal court to be constrained by state rules pertaining to *forum non conveniens* since it is a doctrine affecting the court itself. It is illogical that federal district courts, operating on a national scale, should be bound to apply the various state jurisprudence pertaining to state doctrines of *forum non conveniens*. Thus, logic, Professor Moore and various federal court decisions are cited in support of Respondents' contention that the federal rules of *forum non conveniens* apply to this case. On the other hand, Petitioners cite nothing directly in support of their illogical contention. Rather, their argument is convoluted and is based in large part upon a decision—*Hanna*—which is inapposite with respect to the present facts.

CONCLUSION

For the above reasons the petition should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief in Opposition was mailed this 15th day of October, 1985, to: JANE N. SAGINAW, ESQ. and RUSSELL W. BUDD, ESQ., Baron & Budd, 8333 Douglas Avenue, 10th Floor, Dallas, Texas 75225 and HENRY BURNETT, ESQ., Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., City National Bank Building, 25 West Flagler Street, Miami, Florida 33130; BURT BALLANFANT, ESQ., Shell Oil Co., Litigation Section, 900 Louisiana, Room 4794, Houston, Texas 77001.

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Appendix

NON-FULLY OWNED SUBSIDIARIES AND AFFILIATES OF THE DOW CHEMICAL COMPANY AS OF SEPTEMBER 30, 1985

Subisidaries and affiliates owned both directly and indirectly have been included. The company underlined is the direct owner of the companies listed below it. "Dow's" percent ownership is indicated by each company.

SUBSIDIARIES

THE DOW CHEMICAL COMPANY

Alamo Land Company, Inc. (56%)
Gruppo Lepetit S.p.A. (99%)
L.I.F.E. (Laboratorios Industriales Farmaceuticos Ecuatorianos (59%)
Laboratorios L.I.F.E. del Salvador S.A. (59%)
Negocios e Industrias S.A. "Neisa" (59%)
Pacific Chemical Berhad (51%)
Pacific Cable Products Sendirian Berhad (26%)
Ivon Watkins-Dow, Ltd. (51%)
Societe Industrielle de Plastic el de L'acier S.A. (99%)
The Cynara Company (90%)

DOW CHEMICAL A.G. (A.G. owned 100% by The Dow Chemical Company)

Petroquimica-Dow S.A. (70%)

AFFILIATES

THE DOW CHEMICAL COMPANY

Dow Corning Corporation (50%)
Dowell Schlumberger Corporation (50%)
Dowell Schlumberger Incorporated (50%)
Compagnie des Services Dowell Schlumberger (50%)
El Dorado Terminals Company (50%)
Agro-Quimica Maringa (20%)
Bank Mendes Gans (29%)
Chemi-Trol Chemical Company (23%)
DOKI (49%)
Estireno Del Zulia C.A. (25%)
Ibachem, Ltd. (40%)
Oasis Pipeline Company (30%)
Package Machinery Company (29%)
Total Raffinaderij Nederland N.V. (20%)
Zoo Agro de Venezuela C.A. (49%)
Al Miyah Chemicals (Ltd.) (49%)
Baratek (80%)
Boersele Hydrocracker B.V. (45%)
Insul/Crete Company, Inc. (50%)
Joliet Trust Company (50%)
Long Beach Trust Company (50%)
Metal Mark, Inc. (50%)
Oronzio De Nora Impianti Elettrochemici S.A. (50%)
Sinor Corradini Navarra S.A. (90%)
Technovest Corp. (20%)

DOW CHEMICAL, A.G. (A.G. is owned 100% by The Dow Chemical Company)

Polychem, Ltd. (25%)

CORAL NAVIGATION (Coral is owned 100% by The Dow Chemical Company)

Chief Shipping Company (50%)

DOW CHEMICAL COMPANY, LTD. (Ltd. is owned 100% by Dow Chemical A.G.)

Cromarty Petroleum Company, Ltd. (50%)

DOW CHEMICAL CANADA, INC. (Canada, Inc. is 100% owned by The Dow Chemical Company)

Schlumberger Canada, Inc. (50%)
Fort Saskatchewan Ethylene Storage Limited (50%)
Lawrason's Chemical, Ltd. (20%)
Wabiskaw Explorations Limited (50%)

MALIGNE RESOURCES LIMITED (Maligne is 100% owned by Dow Chemical Canada, Inc.)

MT Partnership (50%)

DOW CHEMICAL AFRICA (PTY) LIMITED (Africa is 100% owned by Dow Chemical A.G.)

J.V. Chemicals (50%)

DOW CHEMICAL INTERNATIONAL ENERGY COMPANY (Energy is 100% owned by The Dow Chemical Company)

Scotdril Offshore Co. (50%)

DOW CHEMICAL S.p.A. (S.p.A. is 100% owned by Dow Chemical A.G.)

Corradini Poliuretani S.p.A. (100%)

DOW CHEMICAL IBERICA S.A. (Iberica is 100% owned by Dow Chemical A.G.)

Transformadora De Etileno (50%)

Dow Quimica S.A. (Quimica is 100% owned by The Dow Chemical Company)

Estireno del Zulia C.A. (25%)
Expanso Correctora De Seguros Ltda (33%)

DOFINCO, INC. (Dofinco is 100% owned by The Dow Chemical Company)

DCS Capital Partnership (50%)
DCS Capital Corporation (100%)

DOW FINANCIAL SERVICES CORPORATION (Financial Services is owned 100% by The Dow Chemical Company)

Dow Banking Corporation (82%)
Dow Scandia Holdings Limited (52%)
Dow MBF Limited (57%)
MBF Factors SDN. BHD. (26%)
MBF Leasing BHD. SDN. (10%)
MBF LEASING (S) Pte. Ltd. (49%)

Supreme Court, U.S.
FILED
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No. 85-454

in the Supreme Court of the United States

OCTOBER TERM, 1985

SAUL MUNOZ SIBAJA and
RAFAELA ARRIETA PORRAS, ET AL
Petitioners,

vs.

DOW CHEMICAL COMPANY and
SHELL OIL COMPANY
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT SHELL OIL COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Respondent Shell Oil Company disagrees with the Petitioners' statement of the question presented for review. There may some day be a case which presents in a factually ripe posture the issue suggested by Petitioners. It may even arise in Florida. This is not that case, however, because regardless of whether the district court applied state or federal principals of *forum non conveniens*, the result in this instance would be the same.

There is no *Erie*[1] issue. As was true in *Piper AirCraft Co. v. Reyno*, 454 U.S. 235 (1981) and *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), "the result of [Florida] standards that guide discretion is, so far as here involved, the same as the federal rule." *Gulf Oil, supra* at 509. Furthermore, if in fact this is an issue which could only arise in Florida, and is therefore Florida-peculiar, as Petitioners suggest, it must surely be questioned whether even a case presenting the issue in a proper factual posture would raise itself to one presenting "an important question of federal law" which "should be" settled by this Court. Sup.Ct.R. 17.

Consequently, the sole and only question which could here be presented for review is whether the court below abused its discretion in affirming the dismissal upon the doctrine of *forum non conveniens* of this transitory action which arose in Costa Rica and was brought by Costa Rican citizens and residents. And, that question presents neither an important question

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[1]*Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

of undecided federal law nor one in conflict with any applicable decision of this Court. Neither does this case call for any exercise of this Court's supervisory powers.

PARTIES

No party to this action is a citizen of Florida. Respondents are Shell Oil Company and Dow Chemical Company, both incorporated in the State of Delaware. Dow Chemical Company has its principal place of business in the State of Michigan; Shell Oil Company has its principal place of business in the State of Texas. Neither Respondent corporation has a principal place of business in the State of Florida, and neither is a Florida corporation.

Petitioners are 58 Costa Rican citizens, all of whom reside in Costa Rica, where the alleged injuries occurred; their names have all been listed in Petitioners' Petition for Writ of Certiorari at pp. ii-iii, and are not herein repeated. However, pursuant to Rule 28(1), Shell Oil Company lists below all its United States affiliated companies and subsidiaries, which are not wholly owned, as defined in said Rule.[2]

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[2]Quazite Corporation (Houston, Texas), First Harlem Securities Corp. (New York, New York), Gravcap, Inc. (Schaumburg, Illinois), Heat Transfer Research, Inc. (S. Pasadena, California), Huntsman Chemical Co. (Salt Lake City, Utah), Inland Corp. (Cleveland, Ohio), LOOP, Inc. (New Orleans, Louisiana), Lucky Chance Mining Co., Inc. (Reno, Nevada), MESBIC Financial Corp. of Houston (Houston, Texas), and Seadock, Inc. (Freeport, Texas).

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JURISDICTION

Jurisdiction is sought to be invoked pursuant to 28 U.S.C. §1254(1). Petitioners assert that this Court should exercise its judicial discretion because the Federal Court of Appeals of the Eleventh Circuit has allegedly decided an important question of federal law. Sup.Ct. Rule 17(1)(c). Respondent Shell Oil Company disagrees. There is here presented neither an "important question of federal law" nor a previously unsettled issue. Neither the trial Court nor the Eleventh Circuit abused its discretion—the same discretion accorded Florida Courts with respect to *forum non conveniens*. The decision below is reported at 757 F.2d 1215 (11th Cir. 1985) and is set out in Petitioners' Appendix, as is the unreported decision of the trial Court.

STATUTE INVOLVED

The Rules of Decision Act, 28 U.S.C. §1652 may impliedly be involved in this purported *Erie* case, but it was neither specifically argued nor construed below. This case involves common-law principles of venue and Court management.

NO. 85-454

in the

Supreme Court

of the

United States

OCTOBER TERM, 1985

SAUL MUNOZ SIBAJA and
RAFAELA ARRIETA PORRAS, ET AL
Petitioners.

vs.

DOW CHEMICAL COMPANY and
SHELL OIL COMPANY
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT SHELL OIL COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners are fifty-eight Costa Rican citizens, who reside and work in Costa Rica. They claim they were injured in Costa Rica by exposure to pesticides manufactured by Respondents Shell Oil Company and/or Dow Chemical Company. Neither Respondent is a Florida corporation and neither has its principal place of business in Florida.[3] Nonetheless Petitioners brought suit through their Texas counsel in Miami, Florida. The action was removed to the Federal Court for the Southern District of Florida.

The Florida Federal District Court ultimately dismissed the action upon the doctrine of *forum non conveniens*, giving full consideration to all of the public and private interest factors listed in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The trial Court stated that "applying these considerations to the case at bar, the Court finds that the considerations overwhelming[ly] weigh in favor of dismissal. The private interests are hampered in that the alleged injuries occurred in Costa Rica. All of the Plaintiffs are Costa Rican. Most of the evidence and witnesses are in Costa Rica and none are in Florida, and compulsory process would not be available to compel production of this evidence or attendance of these witnesses. The cost of obtaining the evidence would be substantial, if possible. The Defendants would not be able to implead third parties."

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[3]While both Respondents were subject to service of process in Florida, that makes them neither Florida citizens nor is that fact venue dispositive. Personal jurisdiction and venue are distinctly different doctrines. *Leroy v. Great Western United Corp.*, *443 U.S. 173, 180 (1973).*

As to the public interest factors, the trial Court noted further that "this case is essentially fifty-eight different lawsuits with different elements of damages, negligence, contributory negligence, etc. It could not help but congest this Court's docket . . . because of the logistics of dealing with fifty-eight different plaintiffs at this distance. It would force the Court to conduct a complex exercise in comparative law and consider a foreign law with which this Court is not familiar and which is in a foreign language. . . . It would require local jurors to hear and decide a dispute that has no connection with this community.[4] The trial Court's order of dismissal was entered on August 25, 1983.

That dismissal was affirmed by the Eleventh Circuit Court of Appeals by opinion dated April 16, 1985.

ARGUMENT—THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Contrary to the contention of Petitioners, Florida's Courts have accepted and embraced the doctrine of *forum non conveniens* and have, in fact, dismissed cases thereunder.[5] Florida's Supreme Court has recently re-enunciated the state's public policy with respect to its admittedly narrower but existent *forum non conveniens* doctrine—

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[4]Petitioners have never refuted the further fact, found by the trial Court, that they have an alternative forum with an adequate remedy available to them.

[5]This is so, notwithstanding the gratuitous and overly broad statement contained in *Alcoa Steamship Co., Inc. v. M/V Nordic Regent*, 654 F.2d 147, 155 n.10 (2nd Cir. 1978).

> this state has a fundamental interest in resolving controversies *involving its citizens.*

Houston v. Caldwell, 359 So.2d 858, 861 (Fla. 1978), *rev'g* 347 So.2d 1041 (Fla.App. 1977). Conversely, the State need not take an interest in resolving controversies involving non-citizens of Florida and arising in other jurisdictions. In those instances, the Florida judge is vested with the very same federal Court *Gilbert/Piper* discretion to dismiss cases improperly instituted in a Florida forum. Florida's Supreme Court, in *Houston, supra*, adopted this *forum non conveniens* rule, first set out in *Adams v. Seaboard Coastline Railroad Co.*, 224 So.2d 797 (Fla.App. 1969), as follows:

> [T]he recognized law of this state [is] that *if a transitory action is filed in a Court of Florida between nonresident parties seeking to litigate a cause of action accruing in a foreign jurisdiction, the trial Court is accorded a sound discretion in determining whether it should retain jurisdiction of the action or dismiss it* without prejudice to the right of the plaintiff to reinstitute the action in a more appropriate and convenient forum. In the exercise of such discretion, the trial Court may consider whether the filing of the action constitutes forum shopping on the part of the plaintiff; whether it constitutes undue harassment of defendant . . . ; and, whether the convenience of the parties and witnesses, in the interest of justice, requires the action be litigated in a different forum. In the ultimate, however, it is seen that the application of the doctrine of *forum non*

> *conveniens* is restricted to the limited category of cases in which both parties to the action are nonresidents and the cause of action sued upon arose in a jurisdiction outside of Florida. It is only after these two factors emerge and coalesce that the trial Court is authorized to proceed to a determination of whether the criteria necessary to bring into play the doctrine of *forum non conveniens* have been met.

Accord, Seaboard Coastline Railroad Co. v. Swain, 362 So.2d 17 (Fla. 1978).

Florida Courts have historically recognized not only the compelling need to protect its "citizens," be they plaintiffs or defendants, through the Florida Court system, but equally to decline in its discretion access to its Courts by noncitizens in cases involving non-Florida issues arising outside of Florida. The Florida Supreme Court, in *Hagen v. Viney*, 124 Fla. 747, 169 So.391 (Fla. 1936) first stated this as follows:

> It is settled law that Courts of one state are not required to assume jurisdiction of causes between nonresidents arising in other jurisdictions. . . . After all is said, the question of jurisdiction in transitory actions between nonresidents is one of discretion on the part of the Court assuming it. . . .

While it is true that "a long line of Florida cases . . . restrict the application of doctrine of *forum non conveniens* to cases in which neither party to the action is a resident of Florida and in which the causes of action arose outside of Florida," *Sempe v. Coordinated*

Caribbean Transport, Inc., 363 So.2d 194, 197 (Fla.App. 1978), these Petitioners' case falls squarely within Florida's rule allowing dismissal. Petitioners' action is one between non-citizens of Florida arising outside of Florida, in fact outside of the United States. *See also, Killingsworth v. Montgomery Ward & Co.*, 327 So.2d 50 (Fla.App. 1976).

The doctrine of *forum non conveniens* is therefore not unknown in Florida; it is a well entrenched part of Florida's venue rules. The following cases are clear examples of its application by Florida Courts: *Southern Railway Co. v. McCubbins*, 196 So.2d 512 (Fla.App. 1967); *Faulkner v. S.A. Empresa de Viaco Airea Rio Grand*, 222 So.2d 805 (Fla.App. 1969); *Meily v. Agricultural Investment Corp., S.A.*, 276 So.2d 161, (Fla. 1973); *Autry v. Seaboard Coastline R.R. Co.*, 32 Fla.Supp. 53 (Cir.Ct. 1968); *Hubbard v. Southern Railway Co.*, 14 Fla.Supp. 10 (Cir.Ct. 1959); *Baker v. Atlantic Coastline Railroad Co.*, 21 Fla.Supp. 21 (Cir.Ct. 1963). *See also, Underwood, v. University of Kentucky*, 390 So.2d 433 (Fla.App. 1980) (affirming lack of personal jurisdiction dismissal, but stating it would so affirm on *forum non conveniens* grounds as well), and *Southern Railway Co. v. Bowling*, 129 So.2d 433 (Fla.App. 1961) (recognizing applicability of the private and public factors set out in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) but holding that it was not an "abuse of discretion" for the trial Court to refuse to exercise its authority to dismiss an action under the doctrine of *forum non conveniens*). *And see, Ganem v. de Issa*, 225 So.2d 564 (Fla.App. 1969).

In *Southern Railway Co. v. McCubbins, supra*, neither of the parties were citizens of the State of Florida and the claim arose in Tennessee. The plaintiff, resided in

Tennessee; the defendant Railway Company "was a Virginia corporation [and] its principal place of business was not in Florida." Even though the court recognized that the Railway Company had an office and agent in Dade County, Florida and operated its trains in Florida north of Jacksonville, the Court nonetheless dismissed the action upon *forum non conveniens* grounds, citing and relying upon this Court's decision, *Gulf Oil Corp. v. Gilbert, supra*, and holding, in sum, that "it would be difficult to visualize the making of a stronger case for a dismissal under the doctrine."

The same fact pattern is present in *Faulkner, supra*. There the tort action arose out of an accident in Peru. The plaintiffs were not citizens of Florida nor of the United States. The defendants were Varig Airways and the Boeing Company. The case was dismissed upon the doctrine of *forum non conveniens;* the dismissal was affirmed upon the authority of *Southern Railway Co. v. McCubbins, supra*, and upon the principles set out by this Court in *Gulf Oil Corp. v. Gilbert, supra*.

The same result occurred again, in *Meily, supra*, where the plaintiff was a citizen of London, England, and the defendants were a Panamanian corporation and Luxembourg corporation. As in *Faulkner* and in *McCubbins*, the cause of action arose outside the State of Florida.

The *Gulf Oil Corp. v. Gilbert, supra*, factors, dictating *forum non conveniens* dismissal, appear again in the published trial Court decisions, *Autry, Baker*, and *Hubbard, supra*, all *forum non conveniens* dismissals. In *Baker*, for example, the plaintiff was a citizen and resident of North Carolina. The defendant railroad was

a Virginia corporation, which did business in the State of Florida. Adopting, again, this Court's standards set out in *Gulf Oil Corp. v. Gilbert, supra*, the Florida trial Court declined to exercise its jurisdiction upon the doctrine of *forum non conveniens*.[6]

The three Florida cases cited by Petitioners in support of their bald statement that "the law of the State of Florida precludes a *forum non conveniens* dismissal of this action" are factually inapposite (see Petitioners' Brief, p. 6). In all three, *Houston v. Caldwell*, 359 So.2d 858 (Fla. 1978); *Seaboard Coastline R. v. Swain*, 362 So.2d 17 (Fla. 1978); and *Waite v. Summit Leasing & Capital International Corp.*, 441 So.2d 185 (Fla.App. 1983), at least one of the parties was in fact a Florida resident and citizen. This is likewise true of *Shaw v. Seaboard Coast Line Ry*, 229 So.2d 275 (Fla.App. 1969). There, dismissal was denied because the defendant railroad was a Virginia corporation, but because its principal place of business was in Florida.

That is not so in this instance, however. Here no party is a Florida citizen; no party has its principal place of business in Florida.

There may well be a case, perhaps arising out of Florida, in which the *Erie* issue upon which this Court

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[6]See also, *Underwood v. University of Kentucky, supra*, a libel action. In *Underwood*, the appellate Court affirmed dismissal for lack of personal jurisdiction, but commented that

> [even] if we were to rule that jurisdiction may lie in the courts of this state, we would be nonetheless obliged under the circumstances to dismiss on the basis of forum non conveniens.

has reserved could be met and resolved once and for all, assuming this Court's attentions should be accorded to a narrow Florida-peculiar question. This, however, is not the case.

It is plainly dispositive of this Petition that Florida's *forum non conveniens* doctrine, like the federal doctrine, authorizes discretionary dismissal upon the balancing of the relative convenience of the litigants and the forum upon facts such as are here present. The Eleventh Circuit neither erred in upholding application of the federal principals of *forum non conveniens* (since the state principals would be the same in this instance) nor did it permit the so-called "accident of diversity of citizenship" to constitute the deciding factor in this action. The Eleventh Circuit, and the trial Court, did not "defy" *Erie*. There is and was no "chasm" existing between the Federal and Florida doctrine in this particular instance and no amount of rhetoric by Petitioners can change this.

Furthermore, even assuming *arguendo* that the Florida rule would in this case work a different result, *Erie* does not dictate that the Florida rule be considered because *forum non conveniens* is a matter of procedure, not of substance. This Court has already labeled it as such in *Missouri ex rel. Southern Ry Co. v. Mayfield*, 340 U.S. 1, 3 (1950):

> According to its own notions of *procedural policy*, a State may reject, as it may accept, the doctrine [of *forum non conveniens*] for all causes of action begun in its courts.

To bolster their position, however, Petitioners argue that the law respecting personal jurisdiction and service of process is the law which applies to venue matters. Respondent does not dispute that a "Federal District Court sitting in diversity has *personal jurisdiction* over the defendant to the extent permitted by state law" and does not dispute that it was subject to service of process in Florida. Respondent does however dispute the Petitioners' effort to cloud two different and distinct doctrines by persistent reference to state service of process cases and rules. As explained in *Leroy v. Great Western United Corp.*, 443 U.S. 173, 180 (1979), this is inaccurate. "The question of personal jurisdiction, which goes to the Court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum." *See also, PI, Inc. v. Valcoun Imprinted Papers, Inc.*, 465 F.Supp. 1218 (S.D.N.Y. 1979) and Moore, *1 Moore's Federal Practice*, 90.140 [1.-2]:

> [Federal] jurisdiction of the subject matter relates to the power of the court to hear and determine the matter in litigation. In personam, in rem, and quasi in rem jurisdiction relate to the court's power over the person or property of the defendant. Venue, on the other hand, relates to the locality of a lawsuit, the forum where judicial power may be set in motion, but it does not limit the jurisdiction of the court. . . . Another relationship is that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by statute and the selected forum is proper under venue statutes. Such resistance is recognized by the doctrine of *forum non conveniens*, a facet of

venue, and §1404(a) of the Code, which provides generally for transfer rather than dismissal.

This leaves Petitioners' final argument: application of the "outcome determinative" test.

In this regard, Petitioners concentrate on the Erie statements made by this Court in *Guaranty Trust Company v. York*, 326 U.S. 99 (1945) and *Hanna v. Plumer*, 380 U.S. 460 (1965) ignoring one other *Erie*-relevant decision, *Byrd v. Blue Ridge Rural Electric Cooperative*, 365 U.S. 525 (1958).

Byrd recognizes the broad *Erie* policy of adopting state rules in diversity cases when those rules "bear substantially on the question of whether the litigation would come out one way in the federal court and another way in the state court." But, *Byrd* recognizes also that "outcome" is not the only consideration.

> [There] are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. . . . The policy of uniform enforcement of state-created rights and obligations, see, e.g., Guaranty Trust Company of New York v. York, supra, cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury [citation omitted]. Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that

the litigation should not come out one way in the federal court and another way in the state court.

In *Byrd*, a diversity case, this Court rejected application of South Carolina's rule that the defense of immunity from suit under the workers' compensation laws was one to be decided by a judge rather than a jury. This Court reiterated that "state laws cannot alter the essential character or function of a federal court" because that function is not in any sense a local matter and "state statutes which would interfere with appropriate performance of that function are not binding upon the federal court under either the Conformity Act or the 'Rules of Decision' Act." *See also Simler v. Conner*, 372 U.S. 221, 222 (1963) ("the right to a jury trial in federal courts is to be determined as a matter of federal law in diversity as well as other actions"); and *Donovan v. Penn Shipping Company, Inc.*, 429 U.S. 648, 649-650 (1977) (in the federal system "reviewing the size of jury verdicts is, however, a matter of federal law" and a plaintiff cannot protest a remittitur he accepted in order to open it to challenge on appeal).[7]

[7]The facts of this case make it inappropriate for consideration of the reserved *Erie forum non conveniens* question and this case – on its facts – presents no important question of federal law. It is nonetheless believed that a federal court in a diversity case is governed by federal law on this issue and that this Court, given the appropriate case, will so hold. *See Murphee v. Mississippi Publishing Corporation*, 149 F.2d 138, 140 (5th Cir. 1945); *Brown v. Pyle*, 310 F.2d 95, 97 (5th Cir. 1962); *Miller v. Davis*, 507 F.2d 308 (6th Cir. 1974); *Cochrane v. Iowa Beef Processors*, 596 F.2d 254, 260 (8th Cir. 1979); In *Re Richardson-Merrill, Inc.*, 545 F.Supp. 1130, 1132 (S.D. Ohio 1982), *aff'd* 727 F.2d 608 (6th Cir. 1984); *Hodson v. A.H. Robins Company, Inc.*, 528 F.Supp. 809, 817 (E.D. Va. 1981).

The "outcome determinative" argument fails too, therefore, not only because "outcome determination" is not the last word when it comes to disruption of the federal system but also because this case would have been dismissed by a Florida court not only under its *forum non conveniens* principles but for yet another reason.

Assuming *arguendo* that *forum non conveniens* is a matter of substance, and not a matter of procedural "housekeeping,"[8] then being substantive, Florida's choice of law rules would come into play. A Florida court would be required to apply the substantive law of the jurisdiction with the most signficant contacts to this claim, which would be the law of Costa Rica. See *Klaxton v. Stentor Electric Company, Inc.*, 313 U.S. 487 (1941); *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975); *Bishop v. Florida Special Paint Company*, 389 So.2d 999 (Fla. 1980). In *Bishop, supra*, the Florida Supreme Court adopted the "signficant relationships test" as set forth in the Restatement (Second) of Conflict of Laws §§145-146 (1971) as applicable to tort actions arising in other jurisdictions. Under this rule, "the state where the injury occurred would, under most circumstances, be the decisive consideration indetermining the applicable choice of law." *Bishop, supra, at 1001*

Petitioners here argue that the Florida *forum non conveniens* rule is substantive for *Erie* purposes, but are forced to argue, further, that the same *forum non conveniens* rule is procedural for choice of law purposes, because if it is not a procedural rule of Florida then Costa Rican venue and *forum non conveniens* principles

[8] *Hanna v. Plumer*, 380 U.S. 460, 473 (1965).

will apply in the Florida court. And Costa Rican law would dictate dismissal, because the jurisdiction of Costa Rican Courts is strictly territorial; their Courts entertain no tort actions arising extra-territorially. *Civil Code of Costa Rica*, Articles 6 and 1045-1048; *Labor Code of Costa Rica*, Articles 210-212; and Code of *Civil Procedures of Costa Rica*, Articles 1-7. In sum, therefore, accepting Petitioners' view *in toto*, the *real Erie* issue if any exists is not would the outcome have been different with the application of Florida venue rules but rather would it have been different with the application of Costa Rican venue rules, adopted in Florida under its conflict of laws/choice of law rules. Petitioners want but cannot have it both ways. The alleged "accident of diversity" interferes in no fashion with this proceeding.

CONCLUSION

"A review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reason therefor." Sup.Ct.R.17. Even given the *Erie* question as yet reserved by this Court in *Gulf Oil Corp. v. Gilbert, supra*, this is not the case for resolution of that issue. Applying state or federal (or Costa Rican) principles yields the same result. If there was any forum shopping, it was on the part of these Costa Rican plaintiffs and their Texas lawyers who sought out Florida for this plainly non-Florida lawsuit.

The decision of the Eleventh Circuit was fully consistent with established legal principles. Review is unwarranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been mailed by deposit with the United States post office, first-class postage prepaid on this 16th day of October, 1985, to the following persons:

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No. 85-454 (4)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SAUL MUNOZ SIBAJA and
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Petitioners,

versus

DOW CHEMICAL COMPANY and
SHELL OIL COMPANY
Respondents.

REPLY BRIEF OF PETITIONERS

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-454

SAUL MUNOZ SIBAJA and
RAFAELA ARRIETA PORRAS, ET AL
Petitioner,

versus

DOW CHEMICAL COMPANY and
SHELL OIL COMPANY
Respondent.

REPLY BRIEF OF PETITIONERS

Petitioners pray that a Writ of Certiori issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action on April 16, 1985, petition for rehearing thereof having been denied May 23, 1985.

STATUTE INVOLVED

This case involves application of the Rules of Decision Act, 28 U.S.C. § 1652 (1982), which provides:

> The laws of the several states, except where where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as the

> rules of decision in civil actions in the courts of the United States, in cases where they apply.

REASONS FOR GRANTING THE WRIT

In their Petition for Writ of Certiorari, Petitioners showed that the *Erie* question of whether state or federal forum non conveniens principles govern in a diversity case has been explicitly recognized but left unresolved by this Court on four previous occasions. Most recently the Court stated:

> The Court did not decide this issue because the same result would have been reached in each case under federal or state law. The lower courts in these cases reached the same conclusion: Pennsylvania and California law on forum non conveniens dismissals are virtually identical to federal law. [citation omitted] Thus, here also, we need not resolve the *Erie* question.

Piper Aircraft Co. v. Reyno, 454 U.S. 235, 248 n.13 (1981).

Unlike the previous cases, where the result reached under state or federal principles, the *Erie* problem is squarely and inescapably presented in this case. As the Court of Appeals for the Eleventh Circuit acknowledged in the opinion below:

> We recognize that the application of the federal, rather than the state, forum non conveniens rules alters the outcome of this case. Under Florida law, the plaintiffs would litigate their claims to a conclusion on the merits; under federal law, they are precluded from reaching the merits.

Sibaja v. Dow Chemical Co., 757 F.2d 1215, 1219 (11th Cir. 1985).

The *Erie* problem is thus indisputably before the Court. In their Briefs in opposition to Petition for Writ of Ceriorari, Respondents have made three arguments: that there is in fact no difference between Florida and federal forum non conveniens law; that if the *Erie* question is presented it was answered correctly by the Eleventh Circuit; and that even if a Florida court tried this case, reference to Costa Rican law would mandate dismissal. In this Reply, Petitioners will briefly address each of these arguments.

I.

THE ELEVENTH CIRCUIT'S *ERIE* HOLDING MUST BE REVIEWED BY THIS COURT

Respondents have argued to this Court, for the first time since the inception of this lawsuit, that an *Erie* analysis is not mandated by the circumstances of this case because the Florida rule of forum non conveniens does not differ from the federal rule in the present context, as both rules would require dismissal of the action. Petitioners would simply point out that the Eleventh Circuit explicitly found there would be no dismissal under Florida law (and indeed, Respondents' removal to federal court for the sole purpose of utilizing federal forum non conveniens law itself plainly belies their assertion); in any event, regardless of the merits of this proposition, such an argument should have no bearing on this Court's decision whether to review the Eleventh Circuit holding.

The decision below was founded squarely on the *Erie* doctrine and stands today as precedent that a federal court is free to disregard state law and apply the federal doctrine

of forum non conveniens to dismiss an action where the state rule would require the opposite result. In fact, the Eleventh Circuit opinion has already been cited for that precise holding by a federal district court in Alabama. *Middleton v. Dan River, Inc.*, F.Supp. , No. 83-T-11129N (M.D. Ala. Aug. 15, 1985). Moreover, the decision below can be expected to be relied upon by courts across the country for its broader *Erie* pronouncement that state law may be disregarded in favor of a federal rule at any time before a trial court meets the merits of a case because "[a] trial court only reaches the state rule of decision, relating to the character and result of the litigation, once it has decided to try the case and determine whether the Plaintiff has a valid claim for relief." *Sibaja*, 757 F.2d at 1219.

Clearly, the Eleventh Circuit based its opinion on the recognition of the chasm existing between state and federal rules of forum non conveniens in this case. It stated, without reservation, that

> We recognize that the application of the federal, rather than the state, forum non conveniens rule alters the outcome of this case. Under Florida law, the Plaintiffs would litigate their claims to a conclusion on the merits; under federal law, they are precluded from reaching the merits.

Sibaja, 757 at 1219.

This is the precedent that has been established, and the law as it now exists. Until the fundamental *Erie* problem addressed by the court below is resolved by this Court, the overreaching opinion of the Eleventh Circuit will be freely cited by any federal court attempting to circumvent the required application of state law.

II.

THE DECISION BELOW IS AN IMPERMISSIBLE APPLICATION OF *ERIE*

Respondents argue that even if there is a difference between state and federal forum non conveniens law which presents the *Erie* question, the Eleventh Circuit answered that question correctly when it held that a federal court sitting in diversity is free to disregard state forum non conveniens law and dismiss on federal common law grounds - *not* transfer for the sake of convenience - a case that the state court would have tried.

Respondents correctly state that forum non conveniens relates to the convenience and "housekeeping" of the federal judiciary as an independent system. The linchpin of the Respondents' position is that, despite the fact that the *outcome* is changed in this case by application of federal law - see *Guaranty Trust v. York*, 326 U.S. 99 (1945) - and despite the fact that application of federal law achieves for Defendants a result not possible in state court, thus effecting *inequitable administration of the laws and encouraging forum shopping* between state and federal court - see *Hanna v. Plumer*, 380 U.S. 460 (1965), and *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) - the nature of forum non conveniens as an incident of venue, and as an "affirmative countervailing consideration" allows application of federal law. See *Byrd v. Blue Ridge Rural Electric Cooperative*, 365 U.S. 525 (1958); Respondent Shell Oil Company's Brief in Opposition to Petition of Certiorari at 11.

It is true that the federal system is a separate, independent system which, of course, may properly strive for convenience, uniformity and efficiency. Federal courts, however, have a statute for housekeeping and convenience: the transfer of venue statute, 28 U.S.C. 1404 (1980). This allows transfer

for the convenience of the parties and the courts. This prevents forum shopping between states, and affords federal courts a tool to effect docket convenience and efficiency. This Court confirmed, however, that the convenience of the federal system comes second to *Erie*, when it held that transferee courts must apply the law the transferor court would have applied - which is the law of the state in which the transferor court sits. *Van Dusen v. Barrack*, 376 U.S. 612 (1964). The lesson of *Van Dusen* for the present case is compelling: while the federal system may strive for convenience through transfers, the federal system - wherever trial is most conveniently had - must mirror the state court in which the action is brought.

Forum non conveniens dismissal is a far more drastic thing than §1404 transfer. "Convenience" simply can't outweigh the required *Erie* result. There is no Federal Rule of Civil Procedure or statute on forum non conveniens - see *Norwood v. Kirkpatrick*, 349 U.S. 29, 31-32 (1955) - and the absence of such a Rule or statute indicates that Congress did not wish to give diversity courts discretion to dismiss on this ground (it is interesting that several states do have such a statute: see, e.g., Uniform Interstate and International Procedure Act §1.05 (Inconvenient Forum), in 13 Uniform Laws Annotated (West 1980 and Supp. 1984), showing adoption by seven jurisdictions). An illustrative contrast is admiralty, where forum non conveniens dismissals are common. Such discretion is proper since the source of jurisdictional doctrines is federal, there is no need to duplicate state policies concerning when a case must be heard, and federal common law doctrines can properly obtain.

Respondents rely heavily on *Byrd* as the one *Erie* case standing for the freedom of federal courts as an independent system, but *Byrd* holds only that the incidents of trial in a federal courthouse may be different from those in the state court across the street:

> The policy of uniform enforcement of state-created rights and obligations, see, e.g. *Guaranty Trust Co. v. York*, supra, cannot in every case exact compliance with a state rule - not bound up with rights and obligations - which disrupts *the federal system of allocating functions between the judge and jury* [citation omitted]. Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.

Byrd, 356 U.S. at 538 (emphasis added).

Byrd means, broadly, that the relationship between judge and jury is controlled by federal law.

Simply put, the lesson of *Erie* and *all* its progeny is this: in diversity cases, the federal system can independently establish rules governing the manner of trial and similar matters, or can apply Federal Rules of Civil Procedure and statutes. It *cannot* disregard state laws concerning jurisdiction, "door-closing" statutes, and the like. The law of Florida tells petitioners they may try their case in Florida; the Eleventh Circuit, remarkably, has told them they may not. *Van Dusen* tells them that, even if the federal system determines that trial would be more convenient in another one of its courts, Florida law still governs; a forum non conveniens dismissal - based on a federal common law doctrine - tells them something much different.

Petitioners respectfully submit that if the Eleventh Circuit's ruling is allowed to stand - let alone its assertion that a federal court is free from *Erie* constraints until it reaches

the merits of the case - the *Erie* doctrine will have undergone a radical transformation.

III.

FLORIDA CHOICE OF LAW RULES WILL NOT DICTATE DISMISSAL

Respondents' final argument, that a Florida court's reference to Costa Rican law would result in dismissal anyway, is transparently meritless. Florida tort choice-of-law principles dictate application of the *substantive* law of the jurisdiction with the most significant relationship to the tort. *Bishop v. Florida Specialty Paint Co.*, 389 So.2d 999, 1000 (Fla. 1980) (The question certified to the court "invites us to recede from prior decisions of this Court which have stated that the substantive law applicable to personal injury actions is the law of the state where the injury occurred.") While Costa Rican *tort* law may govern the case, jurisdiction has been assumed by the Florida courts and cannot be disturbed by Costa Rican *jurisdictional* law. Contrary to Respondents' assertion, it is perfectly normal for certain issues to be labeled "substantive" in the *Erie* context of state court-federal court relationships, and "procedural" in the context of choice of law between different jurisdictions. Aside from jurisdictional matters, statutes of limitations are a common example.

CONCLUSION

The Eleventh Circuit explicitly found that in this case, unlike the previous cases in which the Erie-forum non conveniens question has been recognized by this Court, the state and federal doctrines conflicted. It rendered an *Erie* holding, already cited as precedent by a lower court, based solely on that conflict. There is simply no way, however,

that anything in *Erie*, its progeny, or the nature of our federal system can be tortured into support for a dismissal on federal common law grounds of a diversity case which would have been tried in state court, and if the holding below passes unreviewed the meaning of *Erie* will have changed drastically. Respondents final contention that reference to Costa Rican law would dictate dismissal is completely without merit.

Florida gives Petitioners a right to try their case, and the federal court system must enforce that right in a diversity case. For the reasons stated, Petitioners respectfully submit that the writ prayed for should issue.

Respectfully submitted,

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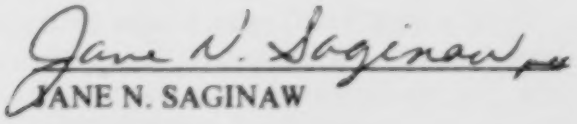
CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing Reply Brief has been mailed to the following counsel of record, pursuant to local rules on this the 29th day of October, 1985.



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